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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

HOWARD R. L. COOK
AND
GEORGE E. PERRY,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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QUESTIONS PRESENTED

1. Does Title 5, United States Code, § 7211, protect Federal employees when they distribute copies to co-workers of testimony which they have provided to Members of Congress?

2. Does the First Amendment permit a Federal agency to dismiss, or otherwise discipline, an employee for statements that he distributed concerning a supervisor's academic credentials when the hearing officer found that the agency was not harmed by the statements?

3. Is it proper for a court to rule on a motion for summary judgment when material questions of constitutional fact remain in dispute?

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THE UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioners respectfully request that a writ of certiorari issue to review the decision of the United States Court of Claims entered in this proceeding on March 13, 1981.

OPINION BELOW

The opinion of the Court of Claims has not been reported and is reproduced as Appendix A. The Court of Claims denied petitioners' motion for a rehearing and suggestion of rehearing *en banc* on April 17, 1981.

JURISDICTION

The motion for rehearing was denied on April 17, 1981, and this petition for a writ of certiorari was filed within 90 days of the date of the denial of the motion. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does Title 5, United States Code, § 7211, protect Federal employees when they distribute copies to co-workers of testimony which they have provided to Members of Congress?

2. Does the First Amendment permit a Federal agency to dismiss, or otherwise discipline, an employee for statements that he distributed concerning a supervisor's academic credentials when the hearing officer found that the agency was not harmed by the statements?

3. Is it proper for a court to rule on a motion for summary judgment when material questions of constitutional fact remain in dispute?

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

Congress shall make no law . . . abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances.

TITLE 5, UNITED STATES CODE, SECTION 7211

The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied.

STATEMENT OF THE CASE

Petitioner Cook is the President of the Black Employees of the Library of Congress (BELC) and has held that position since August 1970. Petitioner Perry is the President of the Ethnic Employees of the Library of Congress (EELC) and has held that position since November 1973.

Both petitioners testified before the Metropolitan Area Congressional Caucus on July 1, 1976. The controversy at issue is focused on the testimony given by plaintiffs at those proceedings, which was distributed to other Federal employees.

After and because of the testimony given and distributed by petitioners, the Library of Congress (the Library) served petitioners with notices of proposed adverse actions in August and September of 1976.

The notices charged that petitioners made and distributed statements concerning Paul Horecky, Chief of the Library's Slavic and Central European Division. Petitioners have always contended that the statements that they made are true. The statements made by petitioners concerned the qualifications and credentials of Mr. Horecky.

The charges against petitioners were investigated by reply officers Marlene C. McGuirl and by Johnny H. Killian of the Library. Marlene McGuirl found the Library's charges to be substantially without merit concerning 6 out of 7 charges; for the one charge that she found had merit she recommended a suspension of 90 days rather than termination.

Mr. Killian recommended that Mr. Cook be disciplined without specifying the extent of the discipline.

The allegations against petitioners Cook and Perry were virtually identical. The charges were:

(1) That petitioners made false and malicious statements against Mr. Horecky when giving statements to the Metropolitan Area Congressional Caucus;

(2) That the statements were made with intent to injure the reputation of Mr. Horecky;

(3) That copies of these statements were distributed to employees of the Library;

(4) That the distribution of copies was made with intent to injure;

(5) That Cook and Perry gained access to confidential documents concerning Mr. Horecky; and

(6) That Cook and Perry failed to get the Library's permission before distributing the statements.

The recommendations of Ms. McGuirl and Mr. Killian were submitted to Glen Zimmerman, the Director of Personnel of the Library. Mr. Zimmerman disagreed with the recommendation that Mr. Perry be suspended for 90 days, and concluded that he should be terminated, and that Mr. Cook should be suspended for 90 days.

The Library then submitted the matter to a hearing examiner for a recommended decision. On July 27, 1979, examiner Gamser recommended that both Mr. Cook and Mr. Perry be given 90 day suspensions. App. C.

The acting librarian decided on August 20, 1979 that he did not agree with the hearing examiner's recommendations, affirmed the termination of Mr. Perry's employment with the Library, and upheld Mr. Cook's suspension. App. B.

Petitioners filed suit in the United States Court of Claims, seeking reinstatement and back pay, *inter alia*, invoking jurisdiction under 28 U.S.C. § 1491. Petitioners and the respondent filed cross motions for summary judgment. The Court of Claims denied petitioners' motion and granted the motion of the respondent. App. A.

Mr. Perry was terminated from the Library on July 15, 1977 and has been unable to secure employment since that date. Mr. Cook has remained in grade GS-9 since 1971, at the Library's Congressional Research Service.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Claims significantly undermines the right of Federal employees to communicate freely views on matters of public importance to Congress and to their co-workers. The Court of Claims downgrades the First Amendment rights of Federal employees, and virtually ignores the Congressional directive of 5 U.S.C. § 7211, concerning the right of Federal employees to furnish information to Congress. The Court of Claims added insult to petitioners' injury by failing to allow petitioners to present testimony which would verify that the statements made by petitioners

were truthful, were made with caution, and that the Library of Congress was not harmed.

I.

THE COURT OF CLAIMS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW, THE EXTENT OF FEDERAL EMPLOYEE PROTECTION GRANTED BY TITLE 5, UNITED STATES CODE, SECTION 7211, WHICH HAS NOT, BUT SHOULD BE, SETTLED BY THIS COURT.

The Court of Claims stated: "Plaintiffs' *distribution* of that testimony is not entitled to the protection of 5 U.S.C. § 7211 for the simple reason that other Library employees and members of the public who were given the statements were not in a position to redress the plaintiffs' grievances." App. 6a. The Court's "simple reason" is simply wrong.

Section 7211 gives Federal employees the right to *collectively* petition Congress. *A prioi* the statute intended that employees have the right to communicate with other employees. Otherwise, how could employees do anything collectively if they didn't have the unfettered right to communicate with each other?

Petitioners presented information to the Metropolitan Area Congressional Caucus, composed of Members of Congress from Maryland, Virginia and the District of Columbia. The Library brought adverse actions against Cook and Perry for "furnishing information" to Members of Congress. The adverse actions undeniably interfere with the rights of plaintiffs and others to present information to Congress; citation of testimony before Members of Congress in an adverse action proceeding is a *per se* violation of 5 U.S.C. § 7211 and cannot be tolerated by this Court.

This Court ruled in *Brown v. Glines*, 444 U.S. 348 (1980), that Air Force regulations restricting military employee communications with legislators is constitutional. Restrictions on military communications stands in a markedly different position than civilian communications. This Court noted in *Glines* that 5 U.S.C. § 7211 stands in "marked contrast" to the statute involved in that case. 444 U.S. at 359, n.18.

The extent of civilian employee protection granted by 5 U.S.C. § 7211 is an important question of Federal law which should be settled by this Court. Millions of civilian employees have the right to know if their communications with Congress have limitations, and if communications are limited, employees have a right to know the extent of the limitations. For this reason, certiorari should be granted.

II.

THE DECISION OF THE COURT OF CLAIMS IS IN CONFLICT WITH THE SUPREME COURT'S DECISIONS IN *PICKERING v. BOARD OF EDUCATION*, 391 U.S. 563 (1968), AND *GARRISON v. LOUISIANA*, 379 U.S. 64 (1964).

In *Pickering v. Board of Education*, 391 U.S. 563 (1968), this Court faced issues similar to those presented in this case. Mr. Pickering, a teacher, was dismissed because the Board of Education believed that a letter to the editor, written by Pickering, was false. In this case petitioners made and distributed statements concerning a supervisory employee of the Library of Congress. The Library believed that the statements were false. Petitioners believe that the statements are true.

In *Pickering*, the protected speech was a letter to the editor. In this case the speech was made to a Congres-

sional caucus, and then distributed to fellow employees of the Library of Congress. Both of these methods of communication are protected by the First Amendment, as was the letter in *Pickering.*

The subject matter of the communication in *Pickering* involved the funding of public schools. In this case the subject matter involved false credentials of a high-level government employee. Both of these matters are of grave concern to the public, since both of them involve the proper use of public funds.

In *Pickering,* the Supreme Court found that there was no harm caused by Mr. Pickering's statements, and even though some of his statements were not true, they were protected by the First Amendment. In the instant case, the hearing examiner found that petitioners' statements did not harm the Library of Congress. App. 37a. Petitioners maintain that their statements are true, but the Court of Claims denied them the opportunity to prove the truth of their statements.

This Court has indicated that statements made by public employees on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their superiors. *Garrison v. Louisiana,* 379 U.S. 64 (1964). In *Garrison* the Court relied on its earlier holding in *Barr v. Matteo,* 360 U.S. 564 (1959), which held that FEderal officials were immune from suit for libel and slander if the defamatory publication is made within the scope of official duty.

In the instant case petitioners were testifying about the competence of their superior. That superior had an absolute privilege under *Barr v. Matteo, supra,* and therefore had the wherewithall to defend himself. As

critics of their superior public servant, petitioners have the "fair equivalent" of the immunity granted to their superior. This Court stated the same proposition more eloquently:

> It would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves.
>
> *New York Times v. Sullivan*, 376 U.S. 282-83 (1964). *Quoted in Garrison v. Louisiana*, 379 U.S. at 74.

This Court, in *New York Times v. Sullivan*, recognized that unencumbered free speech could cause erroneous statements and unpleasant attacks on the government, but that unfettered speech must be protected.

Government employees are often the only persons in a position to identify government abuses. Criticism of the government lies at the very heart of the First Amendment. Although *Pickering* and *Garrison* did not involve Federal employees, the principles enunciated in those cases apply with equal force to Federal workers. Certiorari should be granted to clarify the First Amendment rights of Federal employees to distribute statements concerning issues of public importance.

III.

THE DECISION OF THE COURT OF CLAIMS IS IN CONFLICT WITH THE SUPREME COURT'S DECISION IN *PERRY v. SINDERMANN*, 408 U.S. 593 (1972).

Summary judgment affirming the dismissal of a government employee for criticizing his superiors, without full exploration of the constitutional issues, is improper.

This Court, in a case closely analagous to the instant case, *Perry v. Sindermann*, 408 U.S. 593 (1972), held:

> The respondent has alleged that his nonretention was based on his testimony before legislative committees and his other public statements critical of the Regents' policies. And he has alleged that his public criticism was within the First and Fourteenth Amendments' protection of freedom of speech. Plainly, these allegations present a bona fide constitutional claim. For this Court has held that a teacher's public criticism of his superiors on matters of public concern may be constitutionally protected and may, therefore, be an impermissible basis for termination of his employment. *Pickering v. Board of Education, supra.*
>
> *For this reason we hold that the grant of summary judgment against the respondent,* without full exploration of this issue, *was improper.*
>
> 408 U.S. at 598. [Emphasis added.]

The Court of Claims grant of summary judgment for the respondent in this case clearly conflicts with the Supreme Court's ruling in *Perry v. Sindermann, supra.* For this reason certiorari should be granted to review the decision of the Court of Claims.

CONCLUSION

This Court should grant certiorari to settle the interpretation of 5 U.S.C. § 7211, and to uphold its decisions in *Pickering v. Board of Education, supra*; *Garrison v. Louisiana, supra*; and *Perry v. Sindermann, supra.* The free speech rights of millions of Federal workers should not be limited without substantial inquiry. A Supreme Court ruling is necessary to settle these important issues.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF CLAIMS

No. 100-80C

HOWARD R. L. COOK
and
GEORGE E. PERRY

v.

THE UNITED STATES

Defamation as grounds for removal of civilian employee; First Amendment; 5 U.S.C. § 7211 (Supp. II 1978).

Joel D. Joseph, attorney of record, for plaintiff.

Kathleen A. Flynn, with whom was *Acting Assistant Attorney General Thomas S. Martin*, for defendant.

Before FRIEDMAN, *Chief Judge*, KASHIWA and SMITH, *Judges*.

ORDER

This case was argued before the court on cross motions for summary judgment. There is no genuine issue of material fact. We hold in defendant's favor and against plaintiffs.

Plaintiff George Perry, the former head of the Slavic Room of the Library of Congress (Library), and plaintiff Howard Cook, a present Library employee in the Reference Department, were disciplined for the distribution of defamatory statements about Dr. Paul Horecky, Mr. Perry's superior. After a lengthy administrative hearing, plaintiffs were found to have distributed malicious and defamatory statements that Dr. Horecky had misrepresented his academic credentials during his 25 years of honorable service at the Library and was not entitled to be addressed by the term "doctor." The hearing officer also concluded that these statements were made with reckless disregard of their truth or falsity and with malice. As a result of these disciplinary proceedings, Mr. Cook was given a 90-day suspension. Mr. Perry, who had been given a 90-day suspension in 1974 for other defamatory statements about Dr. Horecky, was removed from his position. The plaintiffs do not dispute that these statements violated Library of Congress Regulation (LCR) 2023-1.[1] Rather, plaintiffs argue that LCR 2023-1 is invalid as applied in that the regulation abridges

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[1] LCR 2023-1 provides in relevant part:

"Section 2. *Policy*

"The maintenance of high standards of honesty, integrity, impartiality, and conduct by staff members is essential to assure the proper performance of the Library's business and the maintenance of confidence by citizens in their Government. The avoidance of misconduct and conflicts of interest on the part of staff members through informed judgment is indispensable to the maintenance of these standards.

"Staff members shall not engage in criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct or conduct which adversely reflects on the Library, the Government, or their suitability for employment. The policy of the Library with respect to employee disloyalty, striking or rioting is that encompassed in 5 *USC* 7311-7313."

their First Amendment rights and their statutory right under 5 U.S.C. § 7211 (Supp. II 1978)[2] to petition Congress.

On this record, the Government must prevail simply because the plaintiffs have failed to demonstrate that this disciplinary action violated plaintiffs' constitutional or statutory rights.

Pickering v. Board of Education, 391 U.S. 563, 568 (1968), makes clear that a Government employee may be discharged consistent with the First Amendment on the basis of his speech:

> * * * At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it posesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

See Arnett v. Kennedy, 416 U.S. 134, 160-161 (1974) (plurality opinion of Rehnquist, J.). In *Pickering*, the Court balanced the competing interests to conclude that a showing of malice or reckless disregard of the truth would be necessary to remove a teacher for defamatory

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[2] 5 U.S.C. § 7211 provides:

"§ 7211. *Employees' right to petition Congress*

"The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied."

statements about the school board. Although the Government argues actual malice or recklessness need not be shown where the defamatory statements actually disrupt an employment relationship, see *Pickering, supra* at 570 note 3 and 574; *Meehan v. Macy,* 392 F.2d 822, 833 (D.C. Cir. 1968), *modified,* 424 F.2d 469, *aff'd en banc,* 425 F.2d 472 (1969), that is an issue we need not reach. This record adequately demonstrates reckless disregard of the truth on plaintiffs' part. Prior to these particular defamations, the Library had conducted two formal investigations based on plaintiffs' earlier allegations regarding Dr. Horecky. Both investigations dealt, at least in part, with Dr. Horecky's credentials. Mr. Perry was involved in both investigations; Mr. Cook was a participant in the latter one and it would be impossible to conclude in light of his intimate involvement with this matter that he was ignorant of the first. In addition, these plaintiffs conducted an extremely superficial investigation of the same topic which did not even include an interview with Dr. Horecky. On balance, plaintiffs' "investigation" seems to have been designed more to embarrass than to uncover the truth. Thus, if *Pickering* requires that actual malice or recklessness be shown to sustain these disciplinary actions based on defamation, that burden has been met.

Moreover, if *Pickering* and the plurality opinion in *Arnett, supra,* require a mere balancing of the employees' interest in making these statements with the Government's interest in maintaining a viable work environment, we think the Government has also met its burden. This record demonstrates, and we find, that Mr. Cook's and Mr. Perry's conduct interfered not only with the working relationship between Mr. Perry and his supervisor, Dr. Horecky, but also with the relationship between Dr.

Horecky and the division he was to oversee. Internal management is a proper concert of the Government, and the controls exercised by the Library (*i.e.*, eventual action under LCR 2023-1) were not unconstitutional. The record shows the Library acted in a restrained and proper manner in light of the sustained attacks plaintiffs made against Dr. Horecky and other staff members over a 3-year period. In 1973, the Library investigated Mr. Perry's charges of discrimination by Dr. Horecky and concluded the charges were unfounded. The Library also carefully investigated in 1976 Mr. Cook's and Mr. Perry's charges that Dr. Horecky had misrepresented his academic credentials. In 1974, after Mr. Perry had made his first defamations of Dr. Horecky, the Library placed Mr. Perry on a 90-day suspension (rather than outright dismissal) and warned Perry against like statements. The Library did not impermissibly attempt to restrain Mr. Cook or Mr. Perry from appearing before Congress, nor does the record otherwise suggest the Library sought to restrain their speech away from work. Prior to the final hearing imposing these disciplinary actions, the Library apparently conducted a *third* investigation at Congressional request into Dr. Horecky and his credentials. This record convinces us that these disciplinary actions against Mr. Perry and Mr. Cook under LCR 2023-1 were necessary to maintain a manageable work environment. The Library's actions do not offend the First Amendment.[3]

As to plaintiffs' claim of statutory protection for these actions, we reach a similar conclusion. The defamatory comments presented by the plaintiffs to the Congress are

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[3]We also note the similarity between this regulation and those approved by the *Arnett* plurality, 45 C.F.R. §§ 1015.735-1 and 1015.735-24 (1972). *See Arnett, supra* at 164.

not mentioned in the charges leading to these disciplinary actions. Plaintiffs' *distribution* of that testimony is not entitled to the protection of 5 U.S.C. § 7211 for the simple reason that the other Library employees and members of the public who were given the statements were not in a position to redress the plaintiffs' grievances.

Thus, this case is essentially similar to *Krennrich v. United States*, 169 Ct. Cl. 6, 340 F.2d 653, *cert. denied*, 382 U.S. 870 (1965), and *Ruderer v. United States*, 188 Ct. Cl. 456, 412 F.2d 1285 (1969). In *Krennrich* we held that plaintiff's anonymous letters to superiors, fellow workers, and the wife of a fellow worker were not entitled to the protection of the First Amendment or the right to petition Congress. In *Ruderer*, we held that the dismissal of a civilian Government employee based on false and malicious statements made by the plaintiff against other co-workers and supervisors did not abridge the employee's First Amendment or statutory rights of petition. Specifically, we said in *Ruderer*:

> * * * The findings are in effect that Mr. Ruderer did not believe his statements true, and for such findings the total circumstances afford substantial support. In light of the fact findings, the defamations are not petitions [in the First Amendment sense], having primarily other objects than redress of whatever grievances plaintiff may have had.
>
> * * *
>
> [Moreover, i]t thus does not appear that the statute [5 U.S.C. § 7102 (1964) (now 5 U.S.C. § 7211)] confers an unlimited privilege to transmit knowingly false and malicious statements, which of course would be unhelpful to Congress. In any case, the few Congressional communications here involved would not throw a mantle of immunity

over wrongful statements and acts not involving Congress; and no charge was preferred for any direct communication to Congress the plaintiff made. The most plaintiff could say was that other charges were trumped up in reprisal for his Congressional letters, but he failed to convince the triers of fact that this was true. Plaintiff was blind to the destructive effect which his intra-agency unbridled accusations could not but have had upon the mutual trust which is so necessary among Federal employees whose duties require them to work together.

Thus, plaintiffs were properly disciplined under LCR 2023-1; and we so hold.

Plaintiffs' final argument is that the decision to separate Perry for the efficiency of the Library was too harsh. We disagree. The decision to separate Mr. Perry is a decision within the discretion of the employing agency. *E.g., Kandall v. United States,* 186 Ct. Cl. 900, 930, *cert. denied,* 396 U.S. 837 (1969). Separation decisions will not be overturned by a court if the decision was made in good faith and was reasonable in light of all the circumstances. *Schlegel v. United States,* 189 Ct. Cl. 30, 40, 416 F.2d 1372, 1378, *cert. denied,* 397 U.S. 1039 (1969). Plainfifs have failed to allege the existence of any evidence supporting their allegation that the Acting Librarian's imposition of removal upon Perry was too harsh. To the contrary, in view of the serious nature of Mr. Perry's misdeeds, the serious impact they were likely to have upon Dr. Horecky's organization, and the ineffectiveness of the prior 90-day suspension of Mr. Perry in deterring his improper activities, the Acting Librarian acted well within his discretion in removing Mr. Perry. Since the choice of penalty to be imposed in adverse actions is committed to the discretion of the employing agency and cannot be overturned by the court

unless there is a showing of a manifest abuse of discretion, we sustain the penalty of removal assessed against Mr. Perry. *Tucker v. United States*, 224 Ct. Cl. ___, ___, 624 F.2d 1029, 1034 (1980); *Heffron v. United States*, 186 Ct. Cl. 474, 483-484, 405 F.2d 1307, 1312 (1969); *Grover v. United States*, 200 Ct. Cl. 337, 353 (1973).

IT IS THEREFORE ORDERED that defendant's motion for summary judgment be and is hereby granted. Plaintiffs' motion for summary judgment is hereby denied. Plaintiffs' petition is dismissed.

BY THE COURT

/s/ Shiro Kashiwa
Judge

[March 13, 1981]

APPENDIX B

LIBRARY OF CONGRESS

FMCS No. 77K18829
ADVERSE ACTION REMOVAL

In the Matter of the Appeal of

HOWARD R. L. COOK
and
GEORGE E. PERRY

FINAL AGENCY DECISION

The advisory opinion and recommendations of the Hearing Officer, Howard G. Gamser, in the above-referenced matter were received in my office on August 7. 1979. I noted at the time that the Hearing Officer had dated this report "August 27, 1979," and I concluded that the report date was intended to read "July 27, 1979" since that was the date of the Hearing Officer's cover letter.

Pursuant to my review of the Hearing Officer's report and the Appeals File in this matter, it is my determination and the final agency decision that:

1. As to Charge I.1., I accept the Hearing Officer's opinion on the first category statements (regarding Dr. Horecky's application).

2. As to Charge I.1, I accept the Hearing Officer's opinion on the third category statements (regarding misrepresentation of credentials).

3. As to Charge I.1, I do not accept the Hearing Officer's opinion on the second category statements (regarding Dr. Horecky's persecution of Mr. Perry). The Hearing Officer considers appellants' statements that Dr. Horecky persecuted Mr. Perry to be mere opinion, and that the previous Library response that Dr. Horecky followed normal administrative procedures did not make the statements false. I disagree, because not only do the facts in the file establish the statements to be false, but such opinion cannot have the qualified privilege accorded it by this Hearing Officer; it cannot protect defamation. I cannot ignore the fact that these statements were made in connection with Mr. Perry's continued attacks on Dr. Horecky, wherein he charged Dr. Horecky with fraud, dishonesty, and dishonest practices. These statements tended to bring Dr. Horecky into disrepute, to degrade him in the estimation of his subordinates and superiors, and to deprive him of public confidence. These "opinions" need not have reached the extremity of vituperation before they became actionable. Clearly the publications of persecution made by these appellants contained no prefatory words of modification, were critical beyond reason, and were such that they tended to expose Dr. Horecky to hatred or contempt. These statements were, then, actionalbe per se.

4. As to Charges I.2 and I.3, I do not accept the Hearing Officer's opinion that the Library failed to establish that the published statements of the appellants intended to injure the reputation of Dr. Horecky and undermine the lawful authority of the Library. Although the Hearing Officer presented only limited opinion on both of these charges, three observations about that opinion are clear:

First: that the Library, in the Hearing Officer's opinion, must make a case under the standards the Hearing Officer discussed. (Presumably, these are the standards set out in his discussion of Charge I.1.)

Second: that the statements of the appellants, if true, cannot be the basis for disciplinary action merely for their intent because the Supreme Court rejected the suggestion that ". . . comments on matters of public concern that are substantially correct . . . may furnish ground for dismissal if they are critical in tone."

Third: that the Library must show specifically that an intent to undermine its authority was accomplished.

With respect to the first observation, the Hearing Officer assigns the responsibility but fails to state whether the Library did or did not "make the case." However, on the basis of his own findings in Charge I.1., I must conclude that it did.

With respect to the second observation, it is important to understand that the intention to be considered is not necessarily one which is hostile by its very nature; rather, it is an intention on the part of the appellants that seeks to bring about a result which will intrude upon Dr. Horecky's and the Library's interests in such manner as to do damage. It is an intention that not only includes results or consequences sought but also that which the appellants were substantially certain would follow from their sustained efforts. Here, we are not dealing with a mere intent to do harm; the appellants know that these are false statements, and there is the presence of actual malice. The Hearing Officer so found, and the file so supports. In addition, it is significant to note that on the same page (page 17) of his report, the Hearing Officer has already indicated that the subject matter of

the appellants' statements did ". . . not concern an issue of public importance generally or even importance in the employment relations of the Library." Why the Hearing Officer has chosen to interject this point in the opinion is not clear, but what is clear is that the entire commentary on Charge I.2. results in no clear finding. Nevertheless, conclusions of merit are obvious from the file. Consider:

(a) The responses of the appellants to the Library's previous investigations regarding Dr. Horecky's credentials support the view that they were less interested in arriving at the truth than in seeing punishment for what they perceived to be a wrong.

(b) The repeated assertions that Dr. Horecky was not a doctor and that he lied in defending the publication of that title were actions by the appellants intended for no other purpose other than to damage Dr. Horecky's reputation. This consideration becomes of critical importance when I consider that both of these appellants were previously (February 3, 1976) informed that Dr. Horecky was eligible for his position and that his academic credentials were in order. Their continued attacks, then, served no other purpose but to injure Dr. Horecky's reputation and to scoff at the Library's endeavors to put to rest the concerns of these appellants.

(c) In his opinion on Charge I.1., the Hearing Officer determined that Dr. Horecky was the target of the appellants' statements and that those statements were false, malicious, and not protected. They were, then, by their very nature, actionable per se.

With particular respect to the third observation, but actually in all instances, the Hearing Officer requires that the Library establish specific damage to both Dr.

Horecky and itself. I consider this requirement to be inconsistent with his own findings which clearly establish that the conduct of the appellants was actionable per se. Such a conclusion is sufficient; there is no need to show any specific or special damage to either Dr. Horecky or the Library. That Dr. Horecky did not suffer actual or special damage in the eyes of The Librarian of Congress is of no purport, for the statements and the surrounding circumstances evidenced in this case file do indicate that there was impairment of Dr. Horecky's reputation. Moreover, Mr. Perry's contentions of "psychological torture" as they are found in this record, not only played havoc with the authority of his supervisor, Dr. Horecky, but also with the Library administration's authority in terms of a meaningful employer-employee relationship.

5. As to Charge I.5., I accept the opinion of the Hearing Officer.

6. As to the severity of discipline, I do not accept the opinion of the Hearing Officer. In concluding that Mr. Perry should receive a punishment equal to that imposed on Mr. Cook, i.e., 90-day suspension, the Hearing Officer relied heavily on the earlier (1974) disciplinary action taken against Mr. Perry, and the basis for the 90-day suspension that resulted. Therefore, I considered it necessary to review that earlier report of the hearing and the action taken.

Among those charges identified in Charge 1 of the earlier (1974) adverse action taken against Mr. Perry were the following sub-part charges.

(a) Mr. Perry made a series of defamatory statements, implying in part that Dr. Horecky was a "fraud";

(b) Mr. Perry referred to Dr. Horecky as a "fraud, liar, ignorant person, and one unqualified for his position";

(c) Mr. Perry falsely accused Dr. Horecky of giving preferential treatment to certain division employees and maliciously referred to Dr. Horecky as a "fraud, liar, and incompetent";

(d) Mr. Perry accused Dr. Horecky of being "incompetent, unqualified, corrupt, and given to the use of Communist and Fascist techniques," further stating that Dr. Horecky was "incompetent and fraudulent";

(e) Mr. Perry knowingly made false and/or defamatory statements against Dr. Horecky; and

(f) Mr. Perry reiterated his false accusations against Dr. Horecky.

Each of these sub-charges was, of course, more specific than I have set them down, and each identified a particular occasion and/or set of facts. But the important consideration is that in 1976, the Hearing Officer in that earlier action found Mr. Perry culpable of those charges, noting that on the basis of the record and his (the Hearing Officer's) own observations of Mr. Perry's demeanor on the witness stand, that the statements were activated by personal spite or ill-will. That record is clear: Mr. Perry was culpable of those charges, and more, at that time, and certainly among those charges were those of making false and malicious statements against Dr. Horecky. Yet, the present Hearing Officer cannot agree that the earlier disciplinary action against Mr. Perry was so founded.

I have given consideration to the Hearing Officer now possibly meaning the earlier disciplinary action was founded *only in part* on Mr. Perry's having made false and malicious statements against Dr. Horecky, and that it was only the "cumulative effect" of all charges which

justified the previous 90-day suspension. But the express findings of the earlier Hearing Officer were otherwise:

> "Considering the scope of Perry's derelictions and the extent of disciplinary action that *could have been imposed* on Perry the hearing officer finds the discipline imposed . . . was *lenient* as well as reasonable." [Emphasis supplied.]

Clearly, then, the Hearing Officer in the earlier case saw that the Library could have prevailed on a more severe punishment. The Library could have taken an action to remove Mr. Perry in 1974. It did not. It did not seek to remove him then because the Library took into consideration the very things that Mr. Perry would have the Hearing Officer now consider in mitigation of any punishment against him: 17 years of employment, several years as head of the Slavic Reading Room, and a qualified Greek area specialist. Applying those considerations against the harm resulting from Mr. Perry's actions in 1974, the Library imposed a lesser discipline with the hope that it would bring about a cooperative attitude on the part of Mr. Perry.

It did not have that result. There was no change in his attitude or tactics. What occurred thereafter was a more pronounced, more intensified campaign against Dr. Horecky and the Library administration in general.

The Hearing Officer in the present case is in error in concluding that the Librarian may have ignored or rejected Perry's defense, i.e., the truth of his allegations against Dr. Horecky. He is further in error in identifying the Library's subsequent action against Mr. Perry in particular as one using ". . . Perry's trial tactics to impose a more severe discipline than would otherwise have been imposed." I so conclude on the basis of the following:

(a) The charges against Dr. Horecky, although defamatory in nature, regarding his credentials were, in fact, investigated by the Library.

(b) The result of that investigation was made known to both appellants on February 3, 1976, by Robert W. Hutchison, then Director of Personnel. Mr. Hutchison notified the appellants that a ". . . detailed review of personnel records of Paul Horecky revealed no consequential errors or irregularities relating to any appointment to positions in the Library."

(c) It was not until two months later (April 16, 1976) that the Hearing Officer in the earlier action rendered his findings and recommendations.

(d) Subsequent to their receipt of Mr. Hutchison's report and the findings and recommendations of the Hearing Officer, the appellants nevertheless intensified the campaign against Dr. Horecky and the Library. It was for those subsequent actions, in disregard of the facts presented and previous discipline imposed, that this subsequent action was taken by the Library.

A review of the record and the file in this present action, therefore, must result in non-acceptance of the opinion of the Hearing Officer with respect to the severity of punishment for Mr. Perry.

7. As to the affirmative defenses offered by the appellants, they are denied. To the extent that the Hearing Officer's opinions concur with that finding, I accept his opinion.

8. As to the request for attorney's fees and the allegation of retaliation offered by the appellants, there is no basis nor authority for granting attorney's fees. Moreover, the appellants have failed to establish even a prima facia case of retaliation; the Hearing Officer has

clearly established that the Library's actions against them were well founded and not mere pretext. To the extent that the Hearing Officer's opinion concurs with these findings, I accept that opinion.

9. As to the recommendation of the Hearing Officer that the disciplinary action taken against Howard R. L. Cook be upheld, I accept that recommendation. The appellant Cook's suspension for 90 days, beginning on July 18, 1977, is approved.

10. As to the recommendation of the Hearing Officer that the disciplinary action of dismissal taken against George E. Perry be reduced to suspension for 90 days, I do not accept that recommendation. Instead, I confirm the disciplinary action of dismissal taken by the Director of Personnel, and I approve appellant Perry's dismissal from the Library of Congress as of July 15, 1977.

Some final comments are in order.

With the passage of years, it is often difficult to view events in the same light as one might view them when they occurred. That is a strength which always lies with those accused and against whom an agency takes adverse action. Nevertheless, it remains that there is only one true issue in this case: Was there committed by the appellants a punishable offense? The Hearing Officer found that there was, and I have concurred in that finding, adding to it findings of my own. That Hearing Officer has clearly outlined the case against these two appellants as one of malice. Concurring in that finding, I am able to conclude that they not only violated Library regulations but the reights of other people as well. With respect to Mr. Perry, the previous disciplinary action would appear to have served little purpose. We have seen no metanoia on his part. The United States Government

has an obligation to retain in its service employees who are fit and to question, and in some cases remove, those who are not. Mr. Perry's conduct, herein established, is reprehensible and unprotected, it is provocative and unrestrained, it is continuing in nature, and it belies those defenses he has proffered. It is conduct that clearly questions his suitability for employment in this agency or any agency of the United States Government.

The above decisions are made and actions herein taken this 20th day of August, 1979.

/s/ WILLIAM J. WELSH
The Acting Librarian of Congress

APPENDIX C

BEFORE

HOWARD G. GAMSER, HEARING OFFICER

FMCS No. 77K18829

In the Matter of:

HOWARD R. L. COOK
GEORGE E. PERRY,

Appellant,

and

LIBRARY OF CONGRESS

ADVISORY OPINION TO LIBRARIAN AS PER LIBRARY OF CONGRESS REGULATION 2020

ISSUE

WAS (1) APPELLANT COOK SUSPENDED FROM DUTY FOR NINETY (90) DAYS AND (2) APPELLANT PERRY DISMISSED FROM EMPLOYMENT, IN ACCORDANCE WITH LIBRARY OF CONGRESS REGULATIONS?

Appearances:

For Appellants: David Santee Miller, Esq.

For Library: Peter J. Watters, Esq.

I.

PROCEDURAL BACKGROUND

This proceedings began when the Assistant Director of Personnel, in accordance with Library of Congress Regulation (LCR) 2020-3, filed disciplinary charges against Appellants Perry and Cook. The charges against Cook, filed on August 30, 1976, alleged certain acts of misconduct and proposed a suspension of ninety (90) days. The charges against Perry, filed on September 14, 1976, alleged similar acts of misconduct and proposed dismissal from employment. (Text of charges at LX 4 and 5.)

Appellants were provided with an opportunity to respond in writing and orally to designated Reply Officers.[1] The Reply Officers for the Appellants submitted their recommendations to the Director of Personnel on or about April 16, 1977. The Director issued his opinion with respect to each of the Appellants on June 16, 1977. The Director dismissed two of the charges against Appellants, sustained four other charges and upheld the proposed disciplinary measures. Perry was dismissed as of July 15, 1977, and Cook was suspended for ninety (90) days as of July 18, 1977. (Text of recommendations and decisions at LX 8 and 9.)

Pursuant to the rights provided in LCR 2020-3, the decisions of the Director of Personnel were appealed by Perry and Cook. The Hearing Officer was selected, and

---

[1]Appellant Cook claims that he was denied an opportunity to reply orally to the charges against him. (Brief for the Appellants, p. 25; AX 50). However, in light of the broad scope of examination permitted during the hearing, it cannot be said that Cook was disadvantaged by any such denial.

the hearing conducted, in accordance with provisions of LCR 2020-4. Hearings were held on fourteen (14) days, beginning on January 16, 1978, and concluding on January 25, 1979. By agreement of Counsel for the Appellants and Counsel for the Library, all briefs were submitted by May 25, 1979.

II.

CHARGES AGAINST APPELLANTS

Charge I.1

Perry and Cook published false and malicious statements against an official of the Library, when they claimed that Dr. Horecky, Chief of the Slavic and Central European Division had:

1) falsified his application for employment,

2) misrepresented his academic credentials, and,

3) persecuted Perry, an employee in his Division.

Charge I.2 and I.3

Perry and Cook, through their published statements, intended to injure the reputation of Horecky and undermine the lawful authority of the Library.

Charge I.5

Perry and Cook gained access to and obtained copies of confidential documents in Horecky's Official Personnel Folder and distributed the information.

These acts of Perry and Cook amount to misconduct under LCR 2023-1 which reads, in part:

> Staff members shall not engage in criminal, infamous, dishonest, immoral, or notoroiously disgraceful misconduct or conduct which adversely

reflects on the Library, the Government, or their suitability for employment . . . .

Moreover, staff members shall avoid any action which might result in or create the appearance of:

C. Impeding Library efficiency or economy,

* * *

F. Affecting adversely the confidence of the public in the integrity of the Library or the Government. (LX 27.)

At the commencement of the hearing, Counsel for the Library further specified the exact statements of Perry and Cook which were viewed as false and malicious:

1. Statements regarding falsification of Horecky's employment application.

Mr. Horecky first applied for a position in the Library on August 8, 1950, and again on February 15, 1951. There are differences in these two applications concerning Mr. Horecky's education. (LX 2, 3; AX 9(a), 9(c); T. 32-34.)

2. Statements regarding Horecky's misrepresentation of credentials. (T. 34-37.)

Mr. Horecky has claimed to be a "doctor" of one sort or another in various Library of Congress Information Bulletins. This has been done over a period of twenty-five years that we know about. The fact is that the hearing based on the charges brought against Mr. Perry revealed that Mr. Horecky by his own admission is "no doctor"and holds no Ph.D. or LL.D., or any other degree equal to his claims that have been made in writing for twenty-five years. (LX 2, 3; AX 9(a), 9(c); T. 34.)

Mr. Horecky has admitted under cross-examination in a hearing in 1975 that he does not have Ph.D. or LL.D. degrees as he had claimed and had

published in U.S. Government documents and biographical directories for twenty-five years. (LX 1; AX 9(b), 9(c); T. 36.)

3. Statements regarding persecution:

Mr. Perry has been persecuted for the last three years by Mr. Paul Horecky, the Chief of the Slavic and East [sic] European Division. Mr. Horecky has had the full support of the entire Library administration including the Librarian.

Mr. Perry has been persecuted for the last three (3) years because he exposed these matters and others about a man, Mr. Paul Horecky who heads an important division of the Library of Congress. (LX 2, 3; AX 9(a), 9(c); T. 37.)

III.

APPELLANTS' APPEAL

The Appellants' contentions may be summarized as follows:

1. All statements made by Appellants are true, or substantially true. (Brief for the Appellants.)

2. The discipline imposed by the Library violates the First Amendment rights of Appellants. (Notice of Appeal and Brief for the Appellants.)

3. The discipline imposed by the Library is in retaliation for Appellants' efforts to represent minority employees. (Notice of Appeal and Brief for the Appellants.)

4. The statements of Appellants were made as representatives of organizations and are, therefore, privileged. (Brief for the Appellants.)

5. The entire case is contaminated by gross bad faith of the Library. (Brief for the Appellants.)

IV.

FINDINGS

1. George Perry began his employment at the Library of Congress in 1963 as a Slavic Librarian. In 1964 he was named Curator of the Slavic Room, Slavic and Central European Division and Recommending Officer for the Library's Greek collections. He was promoted to Head, Slavic Room, and Greek Area Specialist in 1971. (AX 70a.) Perry held these positions until he was removed as Head of the Slavic Room in 1975. (AX 3; LX 4.) He continued employment as a Greek Area Specialist until he was dismissed in July 1977. At the time of Perry's initial employment, the Associate Chief of the Slavic and Central European Division was Paul Horecky, a Library employee since 1951. Upon the retirement of the Chief, Horecky was named to that position and was in charge of the Division from 1972 until he retired in 1977. (T. 203.)

2. In the early part of 1973, relations between Perry and Horecky became strained. Each has a different perspective as to the cause, but both agree that no personal communications took place after 1973. (T. 260, 902.)

3. At all relevant times Howard Cook was employed by the Library in the Congressional Research Service. (T. 600.) He was also Executive Director of Black Employees of the Library of Congress (BELC), an organization formed in 1970 to deal with problems of minority employees at the Library. (AX 10, 38.)

4. Perry and Cook became acquainted through activities in BELC. (T. 494.) In 1973 Perry sought Cook's assistance in getting promotions for employees in Perry's Division. (T. 491.) In the course of their work, Perry

and Cook decided to look into Horecky's background. Cook testified to the reasons for this investigation:

> As a result, again, of my experience in aiding employees who found themselves in grievant situations, our organization, the BELC, adopted a policy, years ago, that we would search and inquire into the background of those people that we believed responsible for the grievant situation; and, in many instances, we found that employees and Management have been incompetent or ill prepared and, as a result of that, unnecessary problems and grievances come about. And that reflects our interest and keen awareness of the need for competent and good employees—especially in managerial positions. (T. 495, see also, T. 609, 835 and 1217.)

5. Perry and Cook pursued their investigation of Horecky by consulting biographical directories to determine what educational and employment background was claimed by Horecky and by consulting University catalogues, dictionaries and encyclopedias to verify the accuracy of the published information. (T. 497.) Neither Perry nor Cook ever approached Horecky directly to discuss their findings and conclusions. (T. 297, 507, 612.) In June or July 1973, Perry asked the Director of the Reference Department, Horecky's immediate superior, to investigate alleged misrepresentations and discrepancies in Horecky's educational background and in his participation in the publication of two volumes on the Nuremberg War Trials. (T. 925.) The Director responded that those questions had nothing to do with Horecky's position in the Library. (AX 64.)

6. In October or November 1973, Perry participated in the formation of an organization modeled after BELC, the Ethnic Employees of the Library of Congress (EELC). (T. 877.) Perry became President of EELC,

Cook Treasurer and subsequently Vice President. (AX 57; T. 1168.) Perry was also at this time an official advisor to BELC. (T. 494.)

7. On September 3, 1974, a number of charges were brought against Perry and the Library sought a suspension of ninety (90) days. One of the charges was an allegation that Perry had called Horecky a "fraud." (LX 55, p. 6.) Perry denied the charge. (LX 55, p. 17.) In the hearing on Perry's appeal of the suspension, Perry attempted to prove the truth of the accusation by showing that Horecky did not have the educational degrees which were attributed to him in certain publictions. (LX 6-11; AX 29; T. 374.)

8. In February or March 1975, Cook received from an anonymous source, five or six documents of personnel actions concerning Horecky. Among the documents received were two Standard Form 57's dated (1950 and 1951), two Personnel Action Recommendations (1951) and a Standard Form 86 (1958). (T. 504, 687.) Cook went over the forms with Perry and they found different information on the forms which they viewed as discrepancies in the description of Horecky's background. (T. 506, 1195.)

9. Perry and Cook conteinued to pursue the matter of the alleged misrepresentations of Horecky after the hearings on Perry's suspension concluded. They wrote dozens of letters and presented voluminous documentation to both officials of the Library (T. 510; AX 22) and members of the Joint Committee on the Library of Congress. (T. 515; AX 32.) The Director of Personnel met with them in early 1976 and apparently caused a security investigation of Horecky to be made. (AX 25; T. 644.) In response to the Appellants' request for an

investigation, the Director of Personnel responded with a memorandum which read, in part:

> The fact that there are inconsistencies and/or reportorial interpretations in various nongovernment publications relating to the American equivalent of Paul Horecky's degrees from the University of Prague in no way detracts from or has affected his eligibility for personnel actions taken during his career here. Whether these discrepancies result from inaccurate reporting or false assumptions on the part of others is of no consequence in that they had no bearing on official decisions by the Library. (LX 13.)

Perry and Cook were not satisfied with the response of the Director of Personnel and in a response they termed the discrepancies in the publications "consequential." (LX 14; AX 22.)

10. Sometime prior to July 1, 1976, Perry and Cook authored a report which detailed the alleged discrepancies and misrepresentations appearing both in published biographies and in Horecky's personnel documents. (T. 527; AX 8.)

11. Subsequent to the charges that were filed against Perry in 1974 and prior to July 1, 1976, Perry became concerned with certain actions (and inactions) taken by the Library. Specifically, but not exhaustively, Perry objected to and commented on (1) his superior's denial of in-grade increase (T. 908; AX 74); (2) the omission of his name from the 1974 annual report of the Library (T. 1015; AX 67); (3) criticism of his work on the Greek Incunabula (T. 966; AX 70, 79); and (4) opening of personal mail addressed to him at the Library (T. 946; AX 56).

12. On June 4, 1976, Cook was invited to appear at ad hoc hearings of the Metropolitan Area Congressional Caucus on the issue of fitness for duty examinations in the federal government. (AX 33.) Perry received a similar invitation on June 16, 1976. (AX 60(a).)

13. Both Perry and Cook attended the hearings and each presented prepared statements. (AX 9(b); LX 1 [Perry] and AX 9(a); LX 2 [Cook].) Later the same day, July 1, 1976, the statements of Perry and Cook were distributed to the Librarian and Division Directors. (T. 615.)

14. The statements of Perry and Cook concerned their views of the Library's employment practices, in general and with regard to specific employees. Approximately two pages in each statement dealt with Perry's working relationship under Horecky and Horecky's background. (LX 1, 2; AX 9.)

15. At the conclusion of the caucus hearings, both the Director of Personnel and the Librarian were asked by members of Congress for a report on the charges made by Perry and Cook. (T. 51; LX 28.) In response to those requests, the Director of Personnel had counsel for the Library in this case prepare a report on the status of Horecky's educational background. That report was then forwarded to the interested members of Congress. (LX 6; T. 63.)

16. On July 6, 1976, Cook distributed the July 1 statements to employees in the Slavic and Central European Division. (T. 520, 615.)

17. On July 30, 1976, Perry and Cook, together with two other employees of the Library, distributed the excerpts of the testimony dealing with Horecky and

Perry to employees of the Library as they arrived for work. (T. 615, 1012; AX 9(c); LX 3.)

18. On August 12, a Special Annoucement from the Librarian was circulated to Library employees giving a brief biographical sketch of Horecky and stating:

> I regret that Dr. Horecky's reputation and integrity have been attacked in this manner, and I am using this opportunity to set the record straight. (LX 12.)

19. On August 30, and September 14, 1976, Cook and Perry, respectively, received notice of the charges against them. (LX 4 and 5.)

V.

ADVISORY OPINION OF HEARING OFFICER

Charge I.1: Publication of False and Malicious Statements by Appellants

There is no issue here as to the authorship of the statements presented to the Congressional Caucus and subsequently distributed to Library staff. The Appellants admit that they authored and published the statements which are in evidence as Library Exhibits 1, 2, and 3, and Appellants' Exhibit 9. Thus, the only issues for consideration are (a) whether the statements in question were false and (b) if so, whether the statements were made with malice and (c) if so, whether the statements were nonetheless protected by the First Amendment.

(a) *The accuracy of the Appellants' statements*

The Library has labeled as "false and malicious" three categories of statements: (1) those regarding Horecky's employment application, (2) those regarding Horecky's persecution of Perry and, (3) those regarding Horecky's

misrepresentation of his credentials. Of these categories the Library is unable to sustain its charges as to two.

1. The following statement is not, in my opinion, either false or defamatory:

> Mr. Horecky first applied for a position in the Library on August 8, 1950, and again on February 15, 1951. There are differences in these two applications concerning Mr. Horecky's education. (LX 2, 3; AX 9.)

The documents on which Cook based this statement were submitted in evidence as LX 34 and 35. A very careful comparison of the two documents will reveal "differences" and, as a result, Cook's statement is technically correct. The Library claims that the statement is defamatory nonetheless because, by implication, Cook is suggesting that Horecky changed his 1950 application in order to obtain employment at the Library in 1951. (T. 32.) Obviously, when read in the context of the whole testimony Cook's statement suggests that there may have been something amiss in the Horecky application process. Even so, I do not read Cook's statement as a suggestion that there was intentional falsification on the part of Horecky to meet the Library's employment standards.

2. The statements by Cook and Perry regarding Horecky's persecution present other problems for the Library. The statements in question here are merely dramatic expressions of opinion. Just as an employee may be able to prove race or sex discrimination in a particular case, an employee might be able to prove persecution of one sort or another. The opposite, however, is not true. If an employee perceives discrimination it would be virtually impossible for an employer to prove that there is *no basis in fact* for that opinion. Here, in

Perry's and Cook's mind, Perry was persecuted in a number of ways. (See AX 56 and 74.) The Library's view that the actions in question were normal administrative procedures does not make the Appellants' opinions "false" nor does it make the publication of those opinions "false statements."

3. The Appellants' comments regarding Horecky's misrepresentations constitute the bulk of the Library's case under Charge I.1 and here the Library's charges cannot be dismissed. I have read the reports of Appellants (AX 8, 12, 35, 36, 61, 62) and the sources Appellants relied upon for their statements—personnel documents on Horecky (AX 1, 4, 5, 7, 23, 25; LX 34, 35), biography entries (AX 3), literature on education in Czechoslovakia (AX 6, 13, 14, 15), and material intended to impeach Horecky's credibility (AX 2, 26, 27, 28, 29, 30, 49). In my opinion, each and every one of Appellants' comments in this category includes defamatory inaccuracies.

It would serve no productive purpose to itemize the Appellants' arguments and theories that gave rise to their claims that Horecky is "no doctor," that "by his own admission he is no doctor," and that he has admitted that he "holds no . . . degree equal to his claims that have been made in writing for twenty-five years." Rather, it is important to set forth what a reasonable person, sincerely interested in Horecky's background, would conclude after reading the volumes of material presented by the Appellants. Such a person would, I believe, conclude that Horecky attended classes at several universities in Europe, and eventually received a degree from the University at Prague, Czechoslovakia, which enabled him to practice law in that country; that he left the country during the Nazi occupation, served in the forces

of the Allies, participated in the Nuremberg trials and assisted in the preparation of reports on two of the trials; that he came to the United States and pursued a Master's Degree at Harvard; that he obtained an entry level position at the Library in 1951 and was promoted to, and eventually retired as, Chief of a Division. That is, in fact, the substance of Horecky's claims for the "last twenty-five years."

If a reasonable person needed to know whether or not Horecky could properly call himself "doctor," they would take into account the fact that the Anglo-American educational system is not applied world-wide, that other systems may use different appellations for educational degrees and may not require "three separate degrees" after "high school" for a "doctorate," and that other people with Horecky's education also call themselves "doctor." (T. 1398.) Having considered all of these factors, a reasonable person would not conclude that "he is no doctor."

Finally, it is very difficult to see how an unbiased person could read the transcripts of the earlier hearing submitted by Appellants and deduce that at an earlier hearing Horecky "admitted that he is no doctor." The Appellants' evidence shows only that Horecky admitted he had neither a Ph.D. or a LL.D. but those two degrees do not comprise the entire universe of "doctors."

(b) *The presence of malice*

Having found at least two statements of Appellants to be false, it is necessary to decide whether, as the Library contends, the statements were made with malice, that is, were knowingly false or made with a reckless disregard for their truth or falsity. In considering the presence of malice, I looked primarily to two factors to ascertain the

Appellants' state of mind: the nature of the Appellants' investigation and the extent to which the Appellants dealt with opinions contrary to their own.

The Appellants' investigatory techniques were not designed to develop a comprehensive picture of Horecky's background, as two excerpts from Cook's testimony illustrate:

Q. I see. Directing your attention to this period—generally, from the fall of 1973 on, did you and Mr. Perry begin research?

A. Mr. Perry and I did extensive research into the background of Horecky.

Q. Could you tell us what form your research took?

A. Well, we started with the basic, first, and that was to go through the University catalogues that Mr. Horecky had claimed attendance at, and graduation from, and then we went to dictionaries and encyclopedias and then we went to get a comparison, to American university catalogues, and we got information, and sought information from any place that we could obtain it. And those contradictions—which caused us to do all these things, and to go to these sources—resulted from Mr. Horecky himself, and his various claims.

Q. Did there come a time when you consulted biographical directories?

A. Yes. The biographical directories become a point of consultation simply because of the fact that Mr. Horecky had appeared in large numbers of biographical directories and that they all—or a large number of them—differed with what was contained in one to the other.

Q. I see. How many did you look into—more or less?

A. I believe that when we had finished, the number that we had looked into numbered 25 or 30 biographical directories.

That testimony, appearing at pages 487 and 488 of the transcript, should be compared with the later testimony of Cook regarding the investigation which had taken place by 1976.

Q. Now directing our attention back to Mr. or Dr. Horecky and the research that you and George did as to developing an understanding of the representations that he had made, or had been made concerning him, and the sources that you went to—I don't believe this is repetitive but I may be corrected on it and will pursue other matters:

Could you summarize for us as late June or early July 1976, the types of publications that you looked at, the materials you had in hand; and so forth and so on, that led you to doubt the validity of the Horecky claims?

* * *

A. Yes. By mid-June and eary July of 1976, we had engaged in extensive research into the Horecky matter. We had searched dictionaries. We had searched encyclopedias. We had searched university catalogues both in the United States and university catalogues in Czechloslovakia, and we had the War Crimes trials at Nuremberg, and we had the 30-odd or so biographical directory entries and, we know, based on our experience, that you are entered into a biographical entry by information that

> you supply to that directory, and to proof the entries which go into the biographies . . . .

(T. 598-599.)

It is clear that the Appellants relied on limited information sources during their three-year investigation. They never went to Horecky with their allegations of discrepancies (T. 207, 607); they rejected the idea of contacting the former Chief of the Division for information about degree equivalencies because they didn't think they could get reliable information from him (T. 782); and they failed to question independent experts on East European education (T. 673). Appellants base their reluctance to conduct a more exhaustive investigation on their desire to keep the matter from "spreading too far." (T. 368.) While this is a noble objective, Appellants should have recognized that there is quite a distance between reliance solely on information within their personal knowledge and subjection of the entire matter to the limelight of publicity; a diligent effort to arrive at the truth would have compelled the Appellants to move further along that continuum.

In the same way, Appellants' responses to Library investigations support the view that Appellants were less interested in arriving at the truth than in seeing punishment for what they perceived to be a "wrong." The ultimate goal of the Appellants is best described in a January 1976 letter to the Librarian:

> We wish to emphasize that several investigations have taken place over the last several years concerning matters relative to the Chief of the Slavic and Central European Division.
>
> The repeated investigation of this matter, consuming a great deal of time, by persons who have

known the facts all along, has proven counterproductive.

What is needed now is not more investigation of a problem that is and has been common knowledge and crystal clear in the top echelons of this administration, but concrete action. It is not unreasonable for us to suggest that a resolution of the long-standing problem take place by January 31, 1976. (AX 22g.)

Although Appellants did not detail the type of "concrete action" that they thought should take place, it is clear that their aim was not, as they later claimed at the hearing, an investigation of the matter. (T. 553, 992.)

On the whole, I find that the Appellants stubbornly refused to recognize the limitation of their own information and expertise, that they had a persistent bias regarding the weight of their evidence, and that they made no attempt to reevaluate their conclusions after receiving divergent points of view. (See, for example, AX 22h and LX 14.) The Appellants displayed over the course of three years an obstinate disregard for the truth or falsity of their accusations and that obstinancy supports, I believe, a finding of malice.

(c) *First Amendment protections*

In the Library's view, the publication of false and malicious statements amounts to misconduct under LCR 2023-1 and, therefore, subjects the Appellants to discipline. The First Amendment, however, places additional restraints on public employers and the inquiry must be continued to determine whether or not the speech of the Appellants, though false, is nevertheless protected. The Library recognizes the application of the First Amendment and states:

> The Library's authority to take disciplinary action in cases of defamation is found in *Pickering v. Board of Education* (391 U.S. 563, 1968), and *Arnett v. Kennedy* (416 U.S. 134, 1974). The cases stand for the proposition that public employee speech that unreasonably interferes with the proper administration of public duties may be curbed and such employees disciplined. (Brief for the Library, page 2.)

The *Pickering* decision goes on to hold, however, that *interference* with the administration of public duties is not to be presumed; the Library's brief does not go on to demonstrate that any interference was actually caused by Appellants' statements. The only evidence on the issue of disruption to the Library indicates that the matter passed by quickly. A witness testified that in a conversation with the Assistant Chief of the Slavic and Central European Division, she mentioned Dr. Horecky and then corrected herself by saying "Mr. Horecky." The Assistant Chief assured her that Dr. Horecky was the correct title and she replied, "You just can't believe everything you read." (T. 195.)

The case presents, then, a situation in which public employees have made false and malicious statements but the employer has not shown harm caused by those statements. This type of case has not been presented to the Supreme Court, and, in fact, the Court in *Pickering* specifically pointed that it had:

> no occasion to pass upon the additional question whether a statement that was knowingly or recklessly false would, if it were neither shown nor could reasonably be presumed to have had any harmful effects, still be protected by the First Amendment. 391 U.S. at 574, fn. 6.

Thus in resolving the interests of the Library and the Appellants I have found it necessary to rely on decisions of lower courts as well as the general test articulated by the Supreme Court in *Pickering*:

> The problem in any case is to arrive at a balance between the interests of the [employee] as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. 391 U.S. at 568.

In achieving this particular balance the matter of "public concern" at issue here was framed by the Appellants in a February 1976 memorandum as follows:

> The issue is not whether he [Horecky] is a graduate (following high school) of the law school or law schools of Charles University or/and German University, *but whether he has* a Ph.D. or was awarded or received an LL.D. or the degree of Doctor of Laws, whether he is a Doctor of Political and Legal Sciences or Doctor of Legal and Political Sciences and several other versions of degrees as he has published. [Emphasis added.] [AX 22h; LX 14.]

In the spectrum of concerns to citizens and public employees, it cannot be said that Horecky's educational degrees, or his representation of those degrees, is of particular moment. Indeed, it is not even clear why Appellants themselves were concerned with that issue. They stated that they believed "honesty" was a necessary ingredient to fill any job at the Library (T 835) and that supervisors without valid credentials were threatened by competent employees (T. 609). They could not, however, point to any allegedmisrepresentations that affected Horecky's career as a supervisor. (T. 730.) And the credential that was of most value to Horecky in receiving an appointment to Chief of his Division, a

Master's Degree from Harvard, was never doubted by the Appellants. (AX 48; T. 733.) Thus, the defamatory statements of the Appellants do not concern an issue of public importance generally or even importance in the employment relations at the Library.

With so little of merit on the Appellants' side of the scale, I believe that the Library was correct in viewing the acts of Appellants as misconduct within the meaning of LCR 2023-1. I do not believe that the defamatory comments of Appellants add to the public debate intended to be protected by the Constitution. As the U.S. Court of Appeals for the District of Columbia stated in a case involving defamatory comments on a superior:

> We believe that [the plaintiff] cannot fairly claim that discharge following an attack like that presented by this record comes as an unfair surprise or is so unexpected and uncertain as to chill his freedom to engage in appropriate speech. *Meehan v. Macy*, 392 F.2d 882, 835 (1968).

Charge I.2: Intent To Injure the Reputation of Horecky

The Library asserts that an intent to injure, through speech, the reputation of a management official is actionable whether the speech is true or false. (Brief for the Library, page 3.) This theory cannot be supported in light of the First Amendment protections afforded public employees. If the statements of employees are false, as I believe they are in this case, the employer must make a case under the standards discussed above. If the speech is true, the employer *cannot* discipline the employee for "intent"—the Court in *Pickering* rejected the suggestion that "even comments on matters of public concern that are substantially correct . . . may furnish grounds for dismissal if they are critical in tone." 391 U.S. at 570.

Charge I.3: Intent To Undermine the Authority of the Library

With respect to the Appellants' intent to undermine the authority of the Library, it was not shown that such an end, even if actually intended, was accomplished. I cannot agree that "as far as undermining the authority of the Library is concerned, the criterion is satisfied by the allegations that the Library has covered up Horecky's lies and has conspired to get rid of Perry because he challenged Horecky." (Brief for the Library, page 20.) The criterion would be satisfied only if the Library demonstrated that reliance upon the statements of Perry and Cook caused someone to act in a manner that was detrimental to the Library's authority over its employees. That simply was not shown in the Library's case.

Charge I.5: Unauthorized Access to Personnel Documents

The last charge against each Appellant reads:

> You have without aurhorization and contrary to Library policy gained access to and obtained copies of confidential documents contained in the Official Personnel Folder of Dr. Paul Horecky and have widely distributed information contained therein with the intent to injure the reputation of Dr. Horecky. (LX 4 and 5.)

The library produced no direct evidence that Appellants themselves entered the Library's personnel files. Two witnesses, however, testified that, as far as they knew, the only location of the documents in question had been the Personnel Office. (T. 121.) Assuming that is the case, the Appellants' story is that Cook received, in February or March 1975, "five or six" documents regarding Horecky from an anonymous source. (T. 504,

1195.) Given the nature of that receipt, the question, it seems to me, is whether Cook or Perry had an affirmative duty to return or destroy the material or to withhold publication of the information contained in the material.

There is some reason to believe that, at least for some period of time, Appellants themselves regarded the material as sensitive.[2] In fact, in testimony Perry and Cook admitted that the documents were to be used with extreme care and were official in nature. (T. 687, 1198.) Nevertheless, the burden is not on the Appellants to prove whey they were entitled to keep the documents but on the Library to prove why they were not so entitled. Contrary to the contention of the Library, there are no express Library regulations on the receipt of personnel files, other than the regulations of the Personnel Office (and, discussed above, there was no proof that *those* regulations were violated by the Appellants). Furthermore, there were no markings on the documents prohibiting reproduction or the use of information for other than official purposes. In the absence of such express proscriptions, the actions of the Appellants cannot comprise the sole basis for discipline. In sum, Appellants use of the material showed poor judgment but did not amount to misconduct under LCR 2023-1.

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[2] For instance, eight or nine months after the receipt of the material, Appellants sent a memorandum to the Librarian regarding meetings held with the Director of Personnel on the "Slavic Div. Chief Matter." The Appellants asked the Librarian to "examine the Horecky application or applications of late 1950 and possibly early 1951 . . . . We asked Mr. Hutchison [Director of Personnel] to permit us to inspect the above documents but he refused repeatedly . . . ." (AX 22(f).) Appellants of course already had those documents and knew the precise dates of Horecky's application.

SEVERITY OF DISCIPLINE

Before concluding the discussion of the Library's case it is necessary to assess the propriety of the varying degrees of discipline imposed on Perry and Cook. The basis of discipline in each case is the publication of allegedly defamatory statements, and while the specific words of Perry and Cook differ, the Library does not rely on those differences in measuring the corrective action. Rather, the Library rests the severity of Perry's discipline on the contention that Perry had received prior punishment for the same misconduct. In Charge I.1 the Library states:

> On September 3, 1974, you were charged with *inter alia* making false and malicious statements against Dr. Horecky and others. As a result of charges against you, you were subsequently suspended for 90 days without pay .... (LX 4.)

I cannot agree with the Library that Perry's earlier suspension was based on "making false and malicious statements against Dr. Horecky." The Library's charges in 1974, set forth in LX 55, consisted of forty (40) or so separate incidents, the cumulative effect of which justified, in the view of the Hearing Officer, a suspension of ninety (90) days. Several of the allegations involved conversations in which Perry had allegedly called Horecky, as well as others, "frauds."

Perry initially denied the charge that he had called Horecky a fraud. At the hearing appealing the suspension, however, Perry's lawyers sought to raise the defense of truth; that is, that Horecky did not in fact have the credentials which he claimed. (See LX 6-11.) It is not clear whether the Hearing Officer, and subsequently the Librarian, ignored or rejected Perry's defense on this

point. In either case, however, it was Perry who raised the issue of Horecky's background in the earlier proceeding and not the Library. The Library cannot now use Perry's trial tactics to impose a more severe discipline than would otherwise have been imposed. Thus, Perry should receive a punishment equal to that imposed on Cook.

AFFIRMATIVE DEFENSES OF APPELLANTS

The specific grounds of appeal are set forth above in Section III (pages 4 and 5). Of these contentions, the first two have been discussed inthe analysis of the Library's charges. The remaining defenses are discussed here.

The discipline imposed is in retaliation for Appellants' efforts to represent minority employees.

The appellants ascribe to the Library the motive of retaliation for activities in EELC and BELC. First, Appellants argue, they are active in organizations which represent minorities. Second, Appellants have actively sought to assert the rights of minorities. Thus, they argue the actions taken here (and the actions taken against Perry in other incidents) are attempts to silence the leaders of the organizations and stifle dissent as to Library practices.

Appellants are correct, of course, that a public employer may not discipline employees for their association activities which are protected by the First Activities in support of rights of minorities are further protected by Title VII of the 1964 Civil Rights Act. But participation in associations does not imunize employees from disci-

pline where their actions are outside the ambit of the constitution and statute. In this instance, the Library disciplined employees for defamation and unprotected speech. The Appellants activities in EELC and BELC were not motivating or substantial factors in the decision. See, *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1978).

The statements of Appellants were made as representatives of organizations and are, therefore, privileged.

A related but somewhat different theory of Appellants is that, by their statements, they were speaking for EELC and BELC and thus the statements are privileged. (Brief for the Appellants, pp. 18-20.) In support of this theory, Appellants rely on the fact that the joint boards of the two organizations ratified and approved their statements both before the testimony and before the distribution. (T. 1407, 1408.) Appellants' theory suffers in that there is no proven, or even apparent, connection between the objectives of the organizations and the content of the statements. Appellants never demonstrated in what manner Horecky's credentials effect the rights of minorities in the Library. There was a general allegation as to the need for competent managers in the Library to deal with the problems of minority employees but no basis on which to claim that Horecky was incompetent in this respect. Indeed, since Horecky is presumably an ethnic minority himself (as a native of Czechoslovakia) it would seem that EELC had some obligation to protect his reputation. In any event, it is not clear how an investigation of Horecky would serve to better the interests of the thousand or so minority employees of the Library. There are too many unresolved issues with respect to

BELC's and EELC's interest in the Horecky matter to find that Appellants' function at the hearings was on behalf of those organizations. This is not to suggest that officers in the organizations did not approve of the testimony; the officers who voted for the action most probably did. However, Perry and Cook must stand on their own in suffering the consequences of their statements and actions.

The entire case is contaminated by gross bad faith of the Library.

In the concluding section of the Brief for the Appellants, eleven (11) instances of bad faith on the part of the Library were alleged. In this litany of charges, Appellants refer to incidents dating as far back as 1973, to two charges brought against Appellants but dropped without an assessment of penalties, and to the failure of the Library to process or satisfactorily resolve complaints of Appellants. Even if these charges were proven, they would have no bearing on the present case.[3] More to the point are the allegations that Appellants were denied due process in the present proceeding in that the Library prevented them from interviewing a witness, *i.e.*, Horecky, and introduced surprise documents at the hearing, *i.e.*, Horecky's credentials. Under some circumstances these actions might taint the case of the employer. In this instance, however, it can hardly be said that Appellants were injured. In their three-year investigation the Appellants never spoke to Horecky or

[3]Included under this category is the Appellants' claim that the proceeding is procedurally defective because the Librarian has prejudged the matter through the issuance of LX 12 and LX 31; this is not a matter on which the Hearing Officer may issue an opinion.

asked to see his credentials. Their own bad faith in this regard clearly offsets any displayed by the Library.

REQUEST FOR ATTORNEYS FEES FOR APPELLANTS

Finally, in addition to restitution for lost wages, Counsel for Appellants has requested an award for attorneys fees.[4] The underlying grounds for the request rests on the respective status and culpability of the parties; the underlying authority is based on general equity powers of the courts, provisions of Title VII of the Civil Rights Act and provisions of the Civil Service Reform Act. I am unable to conclude that any of those bases give me the authority to grant the request.

First, the equitable powers of the courts of general jurisdiction do not extend to private persons selected by parties to resolve employment disputes. On the contrary, an arbitrator (or hearing officer, as in this instance) is said to be a creature of the contract or regulation giving rise to the appointment. Appellants' Counsel cited no authority in which private arbitrators or hearing officers have awarded fees and in the absence of such authority, I cannot go beyond my task to recommend a decision regarding the employment dispute.

With respect to the authority granted by the Civil Service Reform Act, the power of an arbitrator to award attorneys fees is found in Sections 1701 and 2302. These

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[4] This request is, of course, predicated on the assumption that Appellants prevail in their appeal. Although I recommended the Appellant Cook's suspension be sustained, I have also recommended that Appellant Perry be returned to employment at the Library. To that extent, Counsel for Appellants has prevailed in this proceeding.

provisions, however, are not merely ancillary but are part of the larger piece of legislation which changed the entire nature of labor-management relations in the federal sector. I have found no case in which these sections have been singled out for retroactive application. Rather, decisions rendered after the passage of the legislation apply the standards as to attorneys fees which were in existence at the time the case arose. See, *Gibson v. Davis*, 587 F.2d 280 (6th Cir. 1978).

Finally, the Appellants did not prevail in any allegation that the employer had violated Title VII of the Civil Rights Act and thus the question whether attorneys fees would have been available under the provision does not need to be answered.

RECOMMENDATIONS TO THE LIBRARIAN

The Hearing Officer concludes that Appellant Cook was disciplined in accordance with Library of Congress Regulations and recommends that the disciplinary suspension of ninety (90) days be upheld.

The Hearing Officer concludes that although Appellant Perry was disciplined in accordance with Library of Congress Regulations, he recommends that the disciplinary dismissal from employment be reduced to a disciplinary suspension of ninety (90) days, with back pay for all additional time lost over and above the ninety (90) days and that he be reinstated to a position of rank

and salary comparable to that he would have held were it not for the dismissal.

Respectfully submitted,

/s/ Howard G. Gamser
Hearing Officer

Issued at Washington, D.C.,
this 27th day of August, 1979.